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No. 84-363

In The
SUPREME COURT OF THE UNITED STATES

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR INTERVENOR-RESPONDENT COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether Congress, which has prohibited interstate banking generally but, through the Douglas Amendment, authorized individual states to lift that prohibition, thereby authorized states to expand interstate commerce by allowing limited, regional interstate banking.

2. Whether a Massachusetts statute which expands interstate commerce by allowing regional interstate banking, violates the Commerce Clause.

3. Whether a Massachusetts statute enacted pursuant to the Douglas Amendment, which authorizes out-of-state holding companies to purchase Massachusetts banks, but only if the home states of such companies offer reciprocal privileges to Massachusetts companies, violates the Compact Clause.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. The Bank Holding Company Act.	4
2. The Massachusetts and Connecticut Actions under the Douglas Amendment.	5
3. Proceedings Below.	8
SUMMARY OF THE ARGUMENT	11
ARGUMENT	17
I. CONGRESS HAS ESTABLISHED PRIMACY OF THE STATES IN DETERMINING BANK EXPANSION POLICIES.	17
A. Historically, The Banking Industry Has Been Geographically Compartmentalized.	18

Page

B. Massachusetts Has A Strong Interest In Allowing Only Limited Interstate Banking And Has Done So In A Reasonable Manner. 30

II. THE MASSACHUSETTS ACT DOES NOT VIOLATE THE COMMERCE CLAUSE. 36

A. Congress Has Authorized The States To Set Conditions On Interstate Bank Acquisitions. 37

B. The Massachusetts Act Does Not Implicate The Fundamental Concerns Of The Commerce Clause. 47

III. THE MASSACHUSETTS AND CONNECTICUT ACTS DO NOT VIOLATE THE COMPACT CLAUSE. 54

CONCLUSION 60

TABLE OF AUTHORITIES

Cases	Page
Bode v. Barrett, 344 U.S. 583 (1953)	59
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	40
First National Bank of Logan v. Walker Bank & Trust Co. 385 U.S. 252 (1966) reh'g denied, 385 U.S. 1032 (1967)	18, 22
Garcia v. San Antonio Metropolitan Transit Authority, __U.S.__, 53 L.W. 4135 (Feb. 19, 1985)	44
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	37
Great Atlantic & Pacific Tea Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976)	47
H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)	48
Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975)	23, 24 29, 51

Page

Lewis v. BT Investment Managers, Inc. 447 U.S. 27 (1980) 32, 38, 45, 46, 47

Mills Music, Inc. v. Snyder, __U.S.__, 105 S. Ct. 638 (1985) 39

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 44, 45

Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., __U.S.__, 105 S. Ct. 658 (1985) 39

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 38, 42

South-Central Timber Development, Inc. v. Wunnicke, __U.S.__, 104 S. Ct. 2237 (1984) 39

Sporhase v. Nebraska, 458 U.S. 941 (1982) 44, 45

Transamerica Corp. v. Board of Governors of Federal Reserve System, 206 F.2d 163 (3rd Cir.), cert. denied, 346 U.S. 901 (1953) 23

United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978) 57

Page

Virginia v. Tennessee,
148 U.S. 503 (1893) 55

Western & Southern Life
Insurance Co. v. State
Board of Equalization of
California,
451 U.S. 648 (1981) 37, 38, 43

Constitutional Provisions

Commerce Clause,
(Art. I, §8 cl. 3) 2

Compact Clause,
(Art. I, §10 cl. 3) 2

Statutes

12 U.S.C. §36 21

12 U.S.C. §§1841 *et seq.* 4

12 U.S.C. §1841(a)(1) 4

12 U.S.C. §1841(c) 4

12 U.S.C. §1842(d) 2, 5

12 U.S.C. §1843 25

12 U.S.C. §1846 25

15 U.S.C. §§1011-1015 38

28 U.S.C. §1254(1) 2

Mass. Gen. Laws Ann. Ch. 167,
§15A (West Supp. 1984) 30

	Page
Mass. Gen. Laws Ann. Ch. 167A, §2 (West Supp. 1984)	2, 6
Mass. Gen. Laws Ann. Ch. 167B, §3 (West Supp. 1984)	31
Mass. Gen. Laws Ann. Ch. 167C, §3 (West Supp. 1984)	21
Mass. Gen. Laws Ann. Ch. 167D, §2 (West Supp. 1984)	30
Mass. Gen. Laws Ann. Ch. 167D, §3 (West Supp. 1984)	31
Mass. Gen. Laws Ann. Ch. 167E, §§2, 6, 7 (West Supp. 1984)	30
Mass. Gen. Laws Ann. Ch. 167F, §2 (West Supp. 1984)	30
Mass. Gen. Laws Ann. Ch. 170, §§22, 25, 26 (West Supp. 1984)	31
Mass. Gen. Laws Ann. ch. 171, §§13, 21 (West Supp. 1984)	31
1983 Conn. Act. 83-4111 (Reg. Sess.)	2, 6
Del. Code. Ann., Title 5 §801 et seq. (Supp. 1984)	29, 52

	Page
Md. Fin. Inst. Code Ann. §5-903 (Supp. 1984)	29
Me. Pub. Law 1983, ch. 302, §2 as amended (1984)	29
N.Y. Banking Law §142-b (McKinney Supp. 1984)	29
R.I. Gen. Laws, §§19-30-1 19-30-2	56
Miscellaneous	
The Bank Holding Company Amendments of 1970, by Carter A. Golambe Associates, Inc. 1 (1971)	23
102 Cong. Rec. 6860 (1956) (Jt. App. A16)	28
70 Fed. Res. Bull. (1984)	1, 2
Geographic Restrictions on Commercial Banking - The Report of the President, Department of the Treasury (1981)	19, 20
Glidden, Legal Constraints On Bank Expansion: Can They Be Removed Without Destroying The Dual Banking System, 1980 U. Ill. L.F. 369	21

	Page
Golembe, "The Evolving Banking Structure" in The Bankers' Handbook (Baugher & Walker, ed.) 1112 (1978)	22
H.R. Rep. No. 609, 84th Cong. 1st Sess., 1-2 (1955)	26
White, Banking Law, 8 (1976)	19

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 740 F.2d 203 and is reproduced at Pet. App. A21-A33. The judgment of the Court of Appeals is reproduced at Jt. App. A3-A4.

The order of the Board of Governors of the Federal Reserve System ("Board") approving the merger of Bank of New England Corporation and CBT Corporation is reported at 70 Fed. Res. Bull. 374 (1984) and is reproduced at Pet. App. A34-A71; the Board's order approving the acquisition by Hartford National Corporation of Arltru Bancorporation, Inc. is reported at 70 Fed. Res. Bull. 353 (1984) and is reproduced at Pet. App. A72-A78. Finally the Board's order approving the acquisition by Bank of Boston Corporation of Colonial Bancorp, Inc. is reported at

70 Fed. Res. Bull. 524 (1984) and reproduced at Pet. App. A79-A86.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on August 1, 1984. A timely petition for a writ of certiorari was granted on January 7, 1985. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause (Art. I, §8, cl. 3) and the Compact Clause (Art. I, §10, cl. 3) of the United States Constitution; 12 U.S.C. §1842(d) ("Douglas Amendment"); a Connecticut statute, 1983 Conn. Act. 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws. Ann. ch. 167A, §2 (West Supp. 1984). These constitutional

and statutory provisions are reproduced at Pet. App. A95-A102.

STATEMENT OF THE CASE

This case centers on the constitutionality of a Massachusetts statute, enacted in accordance with congressional authorization, to permit limited interstate banking which is otherwise federally prohibited. It turns, however, on the construction and application of that congressional authorization, for Massachusetts maintains that its statute does not contravene the negative implications of the Commerce Clause because Congress has authorized such statutes in enacting the Douglas Amendment. The Massachusetts statute expands the local, decentralized banking system established by Congress and expands interstate commerce by removing, albeit selectively, a general

federal ban on interstate banking. The case also requires analysis of a Connecticut law which, with the Massachusetts statute, presents similar and parallel but non-simultaneous expressions of state authority consistent with federal law.

1. The Bank Holding Company Act

The Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§1841 et seq. (the "BHC Act") provides, in Section 3, that a bank holding company may not acquire control of a bank or another bank holding company without the prior approval of the Board.[1/]

1/ The BHC Act defines a "bank holding company" as a company that controls any bank or bank holding company. 12 U.S.C. §1841(a)(1). In pertinent part, 12 U.S.C. §1841(c) defines a "bank" as an "institution organized under [federal or state law] which (1) accepts deposits withdrawable on demand and (2) engages in the business of making commercial loans."

Section 3(d) of the BHC Act, known as the Douglas Amendment, governs the interstate acquisition of banks by bank holding companies. The Douglas Amendment prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of business located in another state, unless:

> the acquisition...is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect and not merely by implication.2/

2. The Massachusetts and Connecticut Actions under the Douglas Amendment.

In December, 1982, Massachusetts enacted an interstate bank acquisition statute which partially lifted the

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2/ 12 U.S.C. §1842(d)(1)

federal ban on interstate bank acquisitions.[3/] The Massachusetts Act authorizes out-of-state bank holding companies to acquire Massachusetts banking entities if two conditions are met. First, the out-of-state bank holding company must have its base in one of the other New England states. Second, the home state of the acquiring bank holding company must afford reciprocal acquisition privileges to Massachusetts banking entities. Connecticut enacted a similar statute governing interstate bank acquisitions in June, 1983.[4/]

3/ Mass. Gen. Laws Ann., ch. 167A, §2 (West Supp. 1984) ("Massachusetts Act") (Pet. App. A101-A102).

4/ 1983 Conn. Acts, Pub. Act. No. 83-411 (Reg. Sess.) ("Connecticut Act") ("Pet. App. A99).

The enactment of the Massachusetts Act and the Connecticut Act constituted the first authorization by those states of interstate banking under the Douglas Amendment; previously all bank acquisitions of Massachusetts and Connecticut banks by foreign bank holding companies had been prohibited.

The Massachusetts Act allowed interstate banking within New England where federal law previously barred it. The challenged state law itself does not prohibit bank holding companies from outside New England from acquiring New England bank holding companies with banks located in Massachusetts. Any restraints on interstate acquisitions arise, rather, from the operation of the Douglas Amendment and the BHC Act.

3. Proceedings Below

Following enactment of the Massachusetts and Connecticut Acts, the Bank of New England, based in Massachusetts, agreed to merge with CBT Corporation, in Connecticut; Hartford National Corporation, also of Connecticut, agreed to acquire Arltru Bancorporation, a Massachusetts corporation; and Bank of Boston Corporation, in Massachusetts, agreed to acquire Colonial Bancorp, Inc., of Connecticut. The Board received applications for approval of these transactions. The petitioners have intervened to oppose Board approval, contending that the statutes violate the Commerce Clause and the Compact Clause.

In March, 1984, the Board held that the Connecticut and Massachusetts Acts provided the express statutory authori-

zation for interstate bank acquisitions required by the Douglas Amendment. (Pet. App. A37, A74, A83). In addition, the Board found that it lacked an adequate basis for declaring that the Acts violate the United States Constitution. (Pet. App. A38-A41, A49-A71, A74-A75, A83). The Board noted that other state statutes which permit out-of-state bank holding companies under narrow circumstances "appear to assume that the states have full discretion to set the terms of entry of out-of-state bank holding companies." (Pet. App. A71). The Board also observed that the history of the Douglas Amendment does not suggest that the states must choose between a complete prohibition on out-of-state bank holding company acquisitions and allowing wholly unfettered

entry to out-of-state bank holding companies. (Pet. App. A71).

On appeal, the Second Circuit Court of Appeals affirmed the Board's orders. The Second Circuit found that the Massachusetts and Connecticut Acts promoted, rather than restricted, interstate commerce. In addition, the Second Circuit concluded that, as to the Commerce Clause, "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (Pet. App. A31). The Court of Appeals also held, as to the Compact Clause challenge, that even if the Acts "were treated as a compact," that would not "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." (Pet. App. A31-A32).

SUMMARY OF THE ARGUMENT

I. Congress has vested in the states primary responsibility for establishing policy in the field of bank expansion through interstate acquisitions or branching. This congressional deference is consistent with the history of the banking industry, which has traditionally been decentralized. This decentralized structure has resulted from legislative concerns with both overarching federal regulation and excessive economic concentration. Therefore, both the state and national banking systems over time have incorporated a host of restrictions which show a preference for strong local banks. Congress has taken cognizance of the uniqueness of the banking industry by enacting the McFadden Act, the Bank Holding Company Act of

1956, and the Douglas Amendment, which divide the nation into fifty banking units. The Douglas Amendment prohibits interstate acquisitions among individual states unless individual states lift the prohibition, so that states can control the expansion of bank holding companies across state lines. A number of states have exercised this congressional grant of authority by enacting a variety of limited restrictions on interstate bank acquisitions, while other states have not lifted the Douglas Amendment ban.

Massachusetts traditionally has closely regulated the banking industry, and only recently allowed limited interstate banking. The challenged Massachusetts Act represents a reasonable but cautious step beyond the historical

isolation of Massachusetts banking. The Massachusetts Legislature has chosen to allow banks in the state to expand, but only in a manner which will ensure that the banks remain sensitive to local needs. This action by Massachusetts comports with the language, purpose and historical background of the Douglas Amendment.

II. The Massachusetts Act does not violate the Commerce Clause both because the Douglas Amendment authorizes the Act and because the Act in no way imposes a burden on interstate commerce. The states are constrained by the negative implications of the Commerce Clause, but Congress operates under no such restraints. Congress may restrict or even prohibit interstate commerce, and Congress has, with unmistakeable clarity,

prohibited all interstate bank acquisitions and then allowed individual states to create exceptions.

It is Congress that has established a scheme in which discrimination is the norm and protection of local interests is the guiding principle. This Court has recognized that where Congress not only renounces a federal interest, as in the area of insurance, but also affirmatively advances local, parochial interests, Congress has provided an express grant of authority for the regional restriction at issue.

These congressional actions demonstrate that the underlying premises of the Commerce Clause do not apply to the banking industry. Ordinary Commerce Clause principles presuppose an intent to create an economically unified nation,

with unrestricted trade among the states. The Douglas Amendment, by contrast, establishes a divided, decentralized, local banking economy which preserves state boundaries. Massachusetts has chosen to expand upon the geographic restrictions imposed by the Douglas Amendment, and to look beyond traditional, parochial notions, a choice which is wholly consistent with the congressional intent to protect the states and allow them to establish bank acquisition policy.

The petitioners' claims of a Commerce Clause violation also fail because the Massachusetts Act does not burden interstate commerce. The Act <u>expands</u> interstate commerce, while it is Congress, through the Douglas Amendment, which has restricted interstate commerce.

III. The Massachusetts Act does not violate the Compact Clause since no compact exists. The New England states have not acted uniformly; rather, Massachusetts, Connecticut, Vermont, and Rhode Island have established different forms of statutes, with different dates of enactment, while Vermont and New Hampshire have not enacted statutes lifting the Douglas Amendment. Moreover, the Massachusetts and Connecticut Acts do not create any independent third level of government or multistate authority. Massachusetts has given up some authority, rather than augmented its power. Finally, since Congress has already divided the nation into fifty bank units and protected the right of states to set bank expansion policy, Massachusetts has not interfered with federal supremacy in

any way by enacting its regional restriction.

ARGUMENT

I. CONGRESS HAS ESTABLISHED THE PRIMACY OF THE STATES IN DETERMINING BANK EXPANSION POLICIES.

The petitioners' assertion that the Douglas Amendment does not authorize states to partially lift the general federal ban on interstate banking, reflects both a refusal to recognize the unique history of banking and a failure to acknowledge congressional intent. The history of banking in the United States reveals that states have long controlled how banks would expand, whether by acquisition or by branch banking. In contrast to the more familiar exercise of Commerce Clause power to enhance a national, unified economy, in

dividing the nation into state-bounded banking units, Congress has recognized, approved, and helped create the unique, decentralized structure of the banking industry. A look at the historical congressional regulation of the banking industry as well as the language and legislative history of the Douglas Amendment, show that the Douglas Amendment indeed authorizes the statutes at issue in this case.

A. Historically, The Banking Industry Has Been Geographically Compartmentalized.

"There has long been opposition to the exercise of federal power in the banking field." First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252, 256 (1966) reh'g denied, 385 U.S. 1032 (1967). This opposition stems,

at least in part, from a concern with an excessive concentration of economic power in large financial institutions. Geographic Re- strictions on Commercial Banking - The Report of the President, Department of the Treasury at 1(1981).

One major consequence of the historical concern with excessive federal authority over banking is the dual banking system, in which banking institutions with state charters stand side by side with nationally chartered banks. The dual banking system began in the early 1800's. White, Banking Law 8 (1976). It continues in effect today with a sophisticated network of federal regulation imposed on the state systems, with simultaneous important deferrals to the states within the federal scheme. This decentralized banking system has developed

approximately 15,000 commercial banks. Geographic Restrictions on Commercial Banking--The Report of the President, Department of the Treasury at 1 (1981).

In addition to the distinctions between state and federal banks, there also exist different forms of financial institutions (e.g., commercial banks and savings and loan institutions). Beyond these divisions within the banking industry based on charters and functions, there lie major geographic barriers as well. Both federal and state law incorporate restrictions which demonstrate the national preference for local, decentralized banking. States have generally prohibited out-of-state banks from opening branches within their borders, and many states have quite severely limited branch banking even within their

boundaries. Glidden, Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System, 1980 U. Ill. L.F. 369, 374. Massachusetts has limited branch banks to areas within the same county as the main bank, or to within forty miles of the main bank. Mass. Gen. Laws Ann. ch. 167C, §3 (West. Supp. 1984).

Congress has also ensured that national (i.e., federally chartered) banks have only limited power to expand by branching so that charters for national banks could not function as a mechanism for avoiding state regulation. The McFadden Act, adopted in 1927 and amended in 1933, 12 U.S.C. §36, serves as the foundation of this federal policy. The McFadden Act limits national banks to the same branching powers as those ex-

pressly permitted to state banks under state law. As a result of the McFadden Act, banks chartered by the federal government cannot operate nationally. Congress intended to leave the question of the desirability of branch banking up to the states. First National Bank of Logan v. Walker Bank & Trust Co., 385 US 252, 258 (1966) reh'g denied, 385 U.S. 1032 (1967). As one commentator has noted, the McFadden Act raised state boundaries "to a level of mystical significance for geographic expansion by commercial banks, with many states free to restrict branching areas even further, or prohibit branching altogether." Golembe, "The Evolving Banking Structure" in The Bankers' Handbook (Baugher & Walker, ed.) 1112 (1978).

A significant exception to this general rule emerged before the turn of the

century through the use of bank holding companies. Such companies, which acquire bank stock and exert control over banks, became important by the early 1920's as a means to expand across state lines. Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1291 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975); Glidden, 380; The Bank Holding Company Amendments of 1970, compiled by Carter A. Golambe Associates, Inc., 1 (1971). As of 1955, even where a state prohibited interstate and branch banking, a bank holding company could still expand into that state by acquiring banks. Glidden, 382; See Transamerica Corp. v. Board of Governors of Federal Reserve System, 206 F.2d 163 (3rd Cir.), cert. denied, 346 U.S. 901 (1953).

Congress responded to this loophole in the geographically segregated system of banking with the passage of the Bank Holding Company Act of 1956. Section 3 of the BHC Act prohibits any acquisition of a bank by a bank holding company without the prior approval of the Board. The Douglas Amendment, or section 3(d), goes even further to promote state primacy by prohibiting the Board from approving any interstate acquisition of a bank by a bank holding company unless the state in which such bank is located has passed a statute expressly authorizing such an acquisition. The Douglas Amendment's purpose was to assure that states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy. Iowa Independent Bankers, 511 F.2d at 1297.

Section 4 of the BHC Act prohibits bank holding companies from engaging in any non-banking activity other than those expressly enumerated therein. In addition, Congress guaranteed that the new legislation would not trench upon the state's traditional authority to regulate banking by providing in section 7 of the BHC Act:

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any state from exercising such powers and jurisdiction which it now or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. §1846.

The BHC Act's legislative history thus demonstrates a congressional intent to protect the traditional American banking system with its dependence upon independent, locally focused institu-

tions, and a desire to impede the growth of large centralized multistate bank holding companies. The House report on the legislation states:

> Evidence developed during the hearings has convinced your committee that bank holding companies are not in accord with the very precepts upon which our banking system rests. The United States early in its history, it should be recalled, adopted a democratic ideal of banking. Other countries, for the most part, have preferred to rely on a few large banks controlled by a banking elite. There has developed in this country, on the other hand, a conception of the independent unit bank as an institution having its ownership and origin in the local community and deriving its business chiefly from the community's industrial and commercial activities and from the farming population within its vicinity or trade area. Its activities are usually fully integrated with the local economic and social organization. The bank holding company device threatens to destroy this democratic grassroots institution.

H.R. Rep. No. 609, 84th Cong., 1st Sess., 1-2 (1955).

Through the McFadden Act, the BHC Act, and the Douglas Amendment, Congress restricted branch offices and holding company acts to a single-state framework, except that states could choose to lift the ban on interstate acquisitions.

The Douglas Amendment is, as Senator Douglas noted, a "logical continuation" of the McFadden Act, with its emphasis on deference to state policy decisions.[5/] Predictably, and in accor-

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5/ Senator Douglas stated, in support of his amendment:

> I wish to repeat that, so far as inter-state acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other states, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

(footnote continued)

dance with the importance of state prerogative in the regulation of banking, a host of distinct state interstate banking laws have followed in the wake of the Douglas Amendment. The states have exercised the power entrusted to them by the Douglas Amendment with a broad spectrum of restrictions on interstate acquisitions. Various states have prohibited wholesale bank expansion by limiting access to bank holding companies located in reciprocal states, or by limiting the

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(footnote continued)

> Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across state lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a state.

102 Cong. Rec. 6860 (1956) (Jt. App. A16).

functions performed by the out-of-state banks so that they do not compete with in-state banks. The challenged regional restriction differs only in that it is linked to geography; indeed, the regional restriction is less restrictive than some other restrictions. See Iowa Independent Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1291 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975).[6/] The states involved all have

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6/ For example, a number of states limit entry by out-of-state bank holding companies to the establishment of special purpose banks which are prohibited from, or restricted in, competing with in-state banks. See, e.g., Del. Code Ann., Title 5, §801 et. seq. (Supp. 1984); Md. Fin. Inst. Code Ann. §5-903 (Supp. 1984). Another state, Maine, allows acquisition by any out-of-state bank but imposes capital and other limitations. Me. Pub. Law 1983, ch. 302, §2, as amended (1984). New York allows bank holding companies to enter the state only if the home state of the bank holding company permits acquisitions by New York holding companies. N.Y. Banking Law §142-6 (McKinney Supp. 1984).

recognized that the Douglas Amendment authorizes states to lift the general ban on interstate bank acquisitions with restrictive, incremental steps.

B. Massachusetts Has A Strong Interest In Allowing Only Limited Interstate Banking And Has Done So In A Reasonable Manner.

The Commonwealth has a long-settled policy of careful regulation of the banking industry in Massachusetts. Its statutes distinguish among banking corporations and provide the different categories of banks with a variety of powers including, among others, the power to receive deposits, the power to lend money, and the power to invest in different kinds of securities. See, e.g., Mass. Gen. Laws Ann. ch. 167, §15A; ch. 167D, §2; ch. 167E, §§2, 6, 7; ch. 167F, §2. The Massachusetts Legislature has

also enacted a number of provisions which carefully limit the powers and authorities of these corporations. See, e.g., Mass. Gen. Laws Ann. ch. 167B, §3; ch. 167D, §3; ch. 170, §§22, 25, 26; ch. 171, §§13, 21.

In consonance with this historical pattern of retaining local control over banking, until 1982 the Commonwealth wholly prohibited banks and bank holding companies located outside Massachusetts from merging with Massachusetts banks or setting up branches in Massachusetts. The challenged Act represents a small, reasonable liberalization of the traditional insulation of the Massachusetts banking industry. It opens up the Commonwealth to out-of-state interests, but limits those who may acquire Massachusetts banks to the relatively small group

of banks located in the other New England states. Those New England banks will generally have assets at levels comparable to those of Massachusetts banks, and will have grown with a focus on very similar local needs. This cautious venture into interstate banking reflects the Massachusetts Legislature's continuing interest in retaining control over bank expansion, an interest consistent with this Court's recognition that banking is "of profound local concern." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 38 (1980).

This legislative restraint results from several legitimate concrete concerns. For example, the Commonwealth has only a limited ability to restrict the entrance of a variety of financial institutions, which perform many of the

same functions as banks, into Massachusetts. The BHC Act does not prevent out-of-state bank holding companies from establishing commercial loan offices in Massachusetts and providing numerous other financial services. Financial institutions have altered their traditional forms -- often precisely to avoid specific regulatory or statutory limitations -- and numerous financial institutions have expanded quite rapidly into interstate commerce. Glidden, 382. States may therefore wish to exercise even more vigilance in patrolling the boundaries still protected.

Furthermore, in passing the Act, the Legislature could reasonably determine that Massachusetts industries have grown sufficiently large to require servicing from larger banks than presently exist

in the Commonwealth. Or the Legislature may simply have wanted to improve the financial health of Massachusetts banks. At the same time, however, the Legislature retained its traditional and legitimate interest in limiting the wholesale absorption of Massachusetts banks by much larger and less responsive out-of-state banks, in the flow of money out of the Commonwealth, in the disruption of local businesses, and in the ability of state agencies to regulate enormous out-of-state bank holding companies. The Legislature, therefore, struck a balance between these competing interests by expanding interstate banking, and thereby expanding interstate commerce, while also ensuring that the larger banks remain sensitive to local concerns and local economic needs. While

the nationally and internationally focused New York banks may believe that the New England restriction does not have a rational basis, the Massachusetts General Court could reasonably find that the historical, cultural, geographical, and economic ties of the region provide good grounds for allowing only New England banks to enter Massachusetts.

These interests and actions of Massachusetts mesh precisely with the concerns that motivated the enactment of the BHC Act and the Douglas Amendment. Massachusetts has consistently demonstrated a strong interest both in regulating banks and in ensuring that banks remain sensitive to local needs. The Douglas Amendment places the decision as to whether to allow interstate banking in the hands of the state, and Massachusetts has exer-

cised that congressional grant of authority in a responsible and constitutionally permissible manner. This congressional intent to provide the states with protection to allow them to develop their own bank expansion policies serves as an important backdrop to the petitioners' constitutional claims.

II. THE MASSACHUSETTS ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

The Commerce Clause claims raised by the petitioners rest upon two contentions: first, that Congress, in the Douglas Amendment, has not provided a sufficiently precise authorization to override the Commerce Clause; and second, that the Massachusetts Act burdens interstate commerce. These contentions fly in the face of law and logic.

A. Congress Has Authorized The States To Set Conditions On Interstate Bank Acquisitions.

The Commerce Clause vests in Congress plenary powers to regulate interstate commerce in any manner which does not conflict with other specific constitutional provisions. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Commerce Clause prohibits state legislation only as a result of its negative implications; that is, the Commerce Clause contains an implied limitation on the power of states to interfere with, or impose burdens upon, interstate commerce. Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 652 (1981).

Congress, however, is not bound by the negative implications of the Commerce Clause. Indeed, Congress has authority

to burden or prohibit interstate commerce altogether. E.g., Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946) (The "scope [of the Commerce Clause] enables Congress not only to promote but also to prohibit interstate commerce."). Moreover, Congress may exercise its plenary power under the Commerce Clause "by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980). Cf. McCarran-Ferguson Act, 15 U.S.C. §§1011-1015; Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 653 (1981) (Congress removed all Commerce Clause limitations on the authority of states to regulate the business of insurance

when it passed the McCarran-Ferguson Act). This Court has held that congressional intent to authorize state legislation that would otherwise violate the Commerce Clause must find "unmistakably clear" expression. South-Central Timber Development, Inc. v. Wunnicke, ___ U.S. ___, 104 S. Ct. 2237, 2242 (1984). Congress has, in enacting the Douglas Amendment, provided that clear expression.

The exercise of identifying the congressional purpose behind the Douglas Amendment "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., __U.S.__, 105 S. Ct. 658, 662 (1985); Mills Music, Inc. v. Snyder, ___ U.S. ___, 105 S. Ct. 638,

645 (1985). Additionally, "[a]s in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979).

In the Douglas Amendment, Congress, with unmistakeable clarity, prohibited all interstate bank acquisitions in the absence of state legislation lifting the prohibition. Congress afforded each state the freedom to carve out its own exceptions from the general ban and in doing so, established a regime quite unlike that analyzed by this Court in other Commerce Clause cases: Congress itself implemented geographic compartments for the banking industry; Congress directed that states have authority to

bar any or all out-of-state bank holding companies, and that if states do not act, wholesale discrimination will be the norm; Congress dictated that the protection of local economic interests is more important than a unified national banking industry. Massachusetts submits that the congressional mandate, embodied both in the statute and its legislative history, to prohibit out-of-state bank acquisitions, provides the express authorization for Massachusetts to act in a less protectionist fashion, while still guarding local banks and local supplies of credit to buttress the local economy.

Support for this contention may also be gleaned from this Court's prior decisions in Commerce Clause cases involving different congressional grants of authority, particularly the McCarran-Ferguson

Act. The petitioners cite the McCarran-Ferguson Act, as an example of an "unambiguous" approval of a burden on interstate commerce imposed by the states. Citicorp brief, 21. In at least one sense, however, the McCarran-Ferguson Act affords states less protection than does the Douglas Amendment. The McCarran-Ferguson Act authorizes states to regulate the business of insurance. If a state takes no affirmative action, the McCarran-Ferguson Act imposes no regulatory scheme and provides a state with no protection. In stark contrast, if a state fails to regulate interstate banking, the Douglas Amendment will affirmatively protect the interests of that state by barring movement of interstate bank holding companies by acquisition into that state. In Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946),

the Court dealt with congressional approval of state regulation and taxation of insurance in the McCarran-Ferguson Act and held that states were free to act in light of the congressional grant of authority in the McCarran-Ferguson Act. Id. at 430-31. More recently, this Court found that Congress had removed all Commerce Clause limitations on the authority of states to regulate and tax insurance companies where a retaliatory state tax discriminated against out-of-state insurers, even though the McCarran-Ferguson Act did not expressly authorize such discrimination. Western & Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 652-653 (1981). These insurance cases demonstrate that where Congress has put in place a scheme which

not only renounces a federal interest, but also affirmatively advances state protectionism, this Court will find the states have been given an express grant of authority to enact statutes which otherwise would be deemed to contravene the Commerce Clause. In this case, the federal political process has already effectively preserved the states interest in regulating bank expansion. Cf. Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S.___, 53 L.W. 4135, 4142 (Feb. 19, 1985).("The political process ensures that laws that unduly burden the states will not be promulgated").

The cases of Sporhase v. Nebraska, 458 U.S. 941 (1982) and New England Power Co. v. New Hampshire, 455 U.S. 331 (1982), cited in petitioner Citicorp's brief at 19-20, also involve very dif-

ferent kinds of statutes. In Sporhase, a group of federal statutes saved state water rights statutes from pre-emption and also subjected disputes in federal projects concerning water rights to state laws, but did not allow the state to restrict the exportation of groundwater. New Hampshire Power Company also involved a provision by Congress saving state laws from pre-emption. In both cases this Court upheld state laws in the face of Commerce Clause challenges, yet the federal statutes authorizing state action fell far short of the comprehensive, affirmative preservation of state insularity established by the Douglas Amendment.

The decision in Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) supra, is even more directly on point.

It clearly supports the proposition that the Douglas Amendment constitutes a congressional authorization of state legislation that would otherwise violate the Commerce Clause. The Court in Lewis reviewed the Board's disaproval of an application for a New York bank holding company to engage in non-banking activities, in accordance with section 4 of the BHC Act, which unlike the Douglas Amendment, imposes no geographic restraints. The Douglas Amendment did not apply since the transactions in question involved the establishment of a non-banking subsidiary under section 4. But the Court made it clear that the Douglas Amendment imposed a general ban under federal law on interstate bank acquisitions and conferred upon the states

> the authority to create exceptions to this prohibition, that is, to permit expansion of banking across state lines where it would otherwise be federally prohibited.

Id at 47. Massachusetts has done precisely what Lewis contemplates by permitting bank expansion and creating an exception to the general federal ban.

B. The Massachusetts And Connecticut Acts Do Not Implicate The Fundamental Concerns Of The Commerce Clause.

The purpose of the Commerce Clause was to create free trade among the states. Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366, 370 (1976). The means of accomplishing this goal was investing Congress, not state legislatures and not the federal executive or judicial branches of government, with the ultimate authority to regulate

interstate trade. Thus, the Commerce Clause reflects the "necessity of centralized regulation of commerce among states" and "the principle that our economic unit is the Nation." H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534-538 (1949). These fundamental premises simply have no application to the Massachusetts Act because Congress, not the states, established a decentralized banking scheme.

Congress, through the McFadden Act, the BHC Act, and the Douglas Amendment, has decreed that the principles of unrestricted trade among the states have no place in the banking industry. Further, while there exists some centralized regulation of banking, state interests and the protection of local banks remain the pre-eminent concerns in the area of

bank expansion through branch banking and interstate bank acquisitions. Congress divided the nation into state-contoured banking districts, thereby declaring the inapplicability of the very underpinnings of the Commerce Clause in the area of bank expansion.

The petitioners contend that the Connecticut and Massachusetts Acts reflect "local parochialism and protectionism" prohibited by the Commerce Clause. Northeast Bancorp brief, 15. Again, the petitioners cite wholly inapposite principles which, ironically, demonstrate how far removed the Massachusetts Act lies from a violation of the Commerce Clause.

To the extent that any statute involved in this case incorporates local parochialism and protectionism, that

statute is the Douglas Amendment. Congress has already established that notions of local parochialism and protectionism or, to use less perjorative language, decentralized and local self-government principles, will provide the framework for the structure of the banking industry. Massachusetts and Connecticut have actually chosen to display less local parochialism by diminishing the geographic discrimination embodied in the Douglas Amendment. Massachusetts has given up a very narrow, local protectionism for a broader form of regulation. The Massachusetts Act does not display local parochialism. Rather, it shows a cautious and reasonable expansion beyond the very boundaries of the local parochialism which Congress has imposed.

Further, the limited protectionism evidenced by the Massachusets Act does not differ, in principle, from many of the interstate bank acquisition statutes which incorporate other, non-geographic restrictions. Other states have conditioned interstate bank acquisitions on the existence of reciprocal statutes in other states, or on various financial conditions. For example, in Iowa Independent Bankers v. Board of Governors, 511 F.2d 1288 (D.C. Cir.) cert. denied, 423 U.S. 875 (1975), the court reviewed a case involving a challenge to an Iowa statute which permitted out-of-state bank holding companies to acquire Iowa banks if they owned at least two banks as of January 1, 1971. The statute effectively limited entry to all but one out-of-state bank holding company. The Court, while

considering an equal protection challenge, found that the state could reasonably enact a discriminatory statute which protected a bank with a pre-existing stake in the state's banking system. Other states, in furtherance of specific parochial interests such as the generation of local jobs, have limited entry by out-of-state bank holding companies to the establishment of special purpose banks, such as credit card banks, which are prohibited from or restricted in competing with in-state banks for customers. E.g., Del. Code Ann. tit. 5, §801 et seq. (Supp. 1984). The purported local parochialism of a Massachusetts Act which actually expands access to the Massachusetts banking industry demonstrates no more impermissible protectionism than a state which allows within its borders only non-competing financial entities.

In sum, it is worth reiterating in bold relief the basic premise of this section of argument: the Massachusetts and Connecticut Acts do not in any way burden or restrict interstate commerce. Those Acts allow an expansion of the banking industry in the New England region. Any restriction on interstate commerce results from the operation of the Douglas Amendment.[7/]

7/ It is important to note that all of the various state statutes enacted concerning interstate bank acquisitions expand interstate commerce only conditionally. The State of New York, as well as certain of its congressmen and its senators, have filed amici brief on behalf of the petitioners. The State of New York, however, can hardly argue that its statute, with its reciprocity provision, does not prevent certain interstate bank acquisitions and thereby impose a restriction on interstate commerce.

III. THE MASSACHUSETTS AND CONNECTICUT ACTS DO NOT VIOLATE THE COMPACT CLAUSE.

The Commonwealth's Compact Clause argument may also be simply stated. The Commonwealth has not entered into a compact with Connecticut merely by virtue of the enactment of the Massachusetts Act. Moreover since Congress has authorized the Massachusetts Act through the Douglas Amendment, the Massachusetts and Connecticut Acts have in no way encroached on federal authority.

The Compact Clause provides that "[n]o state shall...enter into any argument or compact with another state," without the consent of Congress. U.S. Const. Art. I, § 10, cl. 3. But only where an interstate agreement tends "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the

United States" does there exist an impermissible compact. Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

The Massachusetts Act went into effect in December, 1982, while the Connecticut Act was not enacted until June, 1983. Only when the Connecticut Act was passed did it become possible for Connecticut-based bank holding companies to acquire or merge with Massachusetts banks. The Commonwealth does not accept the proposition that an enactment of Connecticut invalidated a pre-existing Massachusetts statute.

Plainly put, no "New England Compact" exists. The petitioners' compact clause claim fails at the very threshold, first, because New England states have not enacted uniform laws. Massachusetts bank holding companies may now acquire banks in Rhode Island and Maine, but not in

New Hampshire or Vermont (neither of which have enacted a statute under the Douglas Amendment). Rhode Island has a statute which limits interstate bank acquisitions to the New England region only until June 30, 1986. After that date, Rhode Island's statute will authorize non-New England bank holding companies to purchase Rhode Island banking entities, so long as the acquiring company's home state affords reciprocal privileges to Rhode Island banking entities.[8/] Maine has a broader statute, allowing out-of-state bank holding companies to acquire Maine banking entities even in the absence of reciprocal privileges for Maine banks in the home states of the out-of-state bank holding companies. Massachusetts does not require

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8/ R.I. Gen. Laws §§19-30-1, 19-30-2.

that other New England states exclude bank holding companies located outside of New England. Thus, the acts cannot be viewed as a cohesive, coordinated attempt to isolate the New England banking region. Rather, Massachusetts and Connecticut have simply lifted the ban imposed by the Douglas Amendment, as to them, only to New England banks which will be relatively familiar organizations.

Nor can the petitioners make a showing that Massachusetts and Connecticut have established a mechanism for establishing any regional pact. Massachusetts and Connecticut have not created a third level of government between the federal and state levels.[9/]

9/ In United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452,

(footnote continued)

Even the most cursory reading of the relevant state laws reveals that Massachusetts and Connecticut have not established any independent multistate authority. Indeed, Massachusetts and Connecticut are actually giving up the authority to prevent certain bank holding companies from entering their borders, rather than

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(footnote continued)

471 (1978), 21 states had adopted legislation which established a "Multistate Tax Compact" for the purpose of equitably taxing businesses that generated taxable income in more than one state. The legislation established a commission composed of the tax administrators of the members states, and authorized the commission to undertake various studies, among other tasks. The Court rejected a challenge to the legislation under the Compact Clause, holding that it did not enhance state political powers nor encroach on federal supremacy. Id. at 472. The member states did not gain the ability to exercise any powers solely by virtue of the legislation, and the states did not delegate any power to the commission. Id. at 473.

gaining the ability to exercise any new powers. The Acts do not increase the authority of Massachusetts or Connecticut in any way, but rather merely expand the economic spheres of the states.

In short, the two Acts merely constitute independent, reciprocal actions by the states and, of course, reciprocal agreements, in and of themselves, do not violate the Compact Clause. Bode v. Barrett, 344 U.S. 583, 586 (1953).

Finally, the petitioners' arguments founder because the state laws at issue in no way interfere with any federal supremacy. Congress has already expressed its contentment with a nation divided into fifty units for banking purposes. Congress has also made clear that states have responsibility for establishing policy in the area of bank growth

through the regulation of branch banking and interstate banking. Since the Acts do precisely what Congress has contemplated--establish policy as to interstate bank acquisitions--without in any way constraining Congress, there is no in- trusion on federal supremacy.

CONCLUSION

For the reasons stated above, the Commonwealth of Massachusetts respectfully requests that the judgment of the court below be affirmed.

RESPECTFULLY SUBMITTED,
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